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The material for a complete comparison of the commercial rules is not yet available; but in the Introduction to the "Materials for the Study of Private Law," is contained certain information which enables us to form an opinion on some of the essential points to be compared.

Among the various agencies of modern commerce (other than those resting on mechanical invention) perhaps the institutions of prime and elemental consequence may be said to be the bank, the exchange, the insurance system, the brokerage contract, and the joint-stock corporation. Of the documentary expedients for facilitating commerce and utilizing credit, the leading and indispensable types are the bill of exchange, the cheque, and the bill of lading. On these things the commerce of to-day is built up, and from them flow the majority of the relations which modern commercial law busies itself in adjusting. Now, the pages of the volume before us demonstrate clearly that, for over two hundred years, Japan has possessed every one of these types of documents, and has thus been familiar, during all that period, with the typical and ordinary transactions which form the material for modern commercial law. We shall not attempt to argue that Japan anticipated the Western nations in the development of these ideas; though this is easily demonstrable, for many of the above instrumentalities, as to all others than the great commercial communities of early modern times. It is enough to call to mind that these ideas are with us of a comparatively recent origin, and to point out that, for more than two centuries, Japan has made use of institutions and expedients which have been known for the same length of time in but few districts of Europe.

The guild of the bankers was organized in Osaka about 1660, the only European districts having, at that time, a real banking system being the commercial towns of Italy. These banks in Japan lacked none of the essential features of our own. They received on deposit, honored cheques, issued

notes, negotiated bills of exchange, discounted bills drawn against merchandise, and acted in general as the intermediaries for commercial transactions. The smaller banks were connected financially with the larger ones, just as the country banks are with those of American cities and the provincial banks with those of London. They supported each other in times of financial embarrassment, performing substantially the functions of banks of to-day. They had some sort of a clearing-house system, the details of which are not yet clear. In short, there is little in the Western idea of a bank which the Japanese institution did not have or could not easily have assimilated.

Exchanges were the successors, alike in Japan and in Europe, of markets and fairs. The Osaka Rice Exchange at Dojima dated back to half a century after the Royal Exchange in London. There were money exchanges also, at which quotations were obtainable for gold, silver, and small money. At the Rice Exchange were brought and sold the rice certificates issued by the storehouse-keepers of the great *Daimyo*, as well as the rice-products shipped to Osaka and Yedo by the farmers themselves. Dealing in futures was one of the elementary notions on 'Change in Japan, and the Government seems to have made efforts, equally strenuous and only a little less futile than those in the West, to stop gambling in staple agricultural products. The sales in the Exchange were conducted very much as they are now; and when the bidding was opened, there was, according to the chronicles, the same madness of behavior and vociferous competition among the brokers of two hundred years ago which characterize this scene in every Exchange to-day. Of options and the like varieties of Exchange transactions, nothing specific is reported in these volumes. But enough is given to show that the methods of the Exchanges were highly developed, and that closer investigation would probably reveal all of the varieties of transactions which we know to-day, or varieties equally complex and technical.

Of insurance no details are as yet furnished us,—only enough to indicate that for the bulk of the sea traffic between

Osaka and Yedo a system of mutual insurance was in operation (under the management of the guilds) for two hundred years. Of the mercantile joint-stock corporation it is not possible, certainly, to say that it existed. Further investigation may show that commercial houses like the Echigo House —where the name was borne by a family of five or six branches having a common stock and a single profit-and-loss account—were managed on the principle of the joint-stock company. Whether this was so or not is here less to our purpose; for the present popularity of the joint-stock company in Japan and the vast area of business now managed by this form of organization puts beyond any question the applicability of the new Codes to Japanese conditions. It is, however, worth pointing out that Japan is in some respects better fitted to comprehend and to apply with facility the modern corporate idea than the countries owning the sway of English law. It has taken nearly a century for the English and American bar and bench to work out the true theory of a business partnership,—the notion of the business is an entity, a legal person, quite distinct in its standing from the individuals who make it up. The true result has come, partly through Germany, but chiefly by self-discovery. Now, in Japan, the notion of a business as an entity requires no effort to appreciate and apply. In the idea of a family and of a family business as an entity it has long been familiar to them. The unity, the unbroken continuity, of a family-business corresponds closely to the modern notion of a partnership, and offers a congenial field for its application in law.

When we come to the cheque, the bill of exchange, and the bill of lading, we find Japan threatening to dispute even with Italy for priority of invention. The cheque cannot be proved to have existed in the commercial transactions of Europe, outside of Italy, until the late seventeenth or early eighteenth century,—in England, indeed, not until about 1760, and in France and other Continental nations not till 1765. In Japan we find the bankers employing cheques (*furi-dashi-te-gata*) as early as, say, 1650. The volume before us describes some of the practices with reference to them. One would, perhaps,

not expect to hear of "certified cheques" in Japan in these banks of the old régime; but there they were. The indorsement was as necessary in this cheque as in our own. The dishonored cheque was equally worthless as a payment of a debt. Perhaps the most startling parallel of all is the rule that a bank which receives from another bank a cheque drawn against no funds, or otherwise faulty, must return it to the latter bank before twelve o'clock in order to recover payment.

For the bill of exchange there are even older traditions. In Europe, if we forget the commerce of the classic ages, and go back only along the lines of modern commerce, we find the bill of exchange introduced, nobody knows exactly where, or exactly by whom, but certainly used and developed by the Italians of the twelfth century and later. In Japan there is a law of the next century, in which such documents (*kaye-sen*) are regulated; and in later times there are plentiful references to them. The later name (*kawase-tegata*) covered a number of varieties brought into existence by the complexities of commerce. We need not here cite proofs in detail. It is sufficient to say that the principle was perfectly understood, and that it was applied in essentially the same transactions as at present. Most worthy of note is the fact that it served effectively to adjust the equilibrium of trade between Osaka and Yedo. The great *Daimyo* of the West in Yedo sold their rice in Osaka; but they and the people of Yedo relied on Osaka for most of the staple manufactures. Thus Osaka owed Yedo *Daimyo* for rice; Yedo wholesalers owed Osaka exporters for manufactures; and by bills of exchange an immense volume of exchange was settled at the least expense. This is only one indication, but a most important one, of the comprehension shown in Old Japanese commerce of the functions of the bill of exchange.

The bill of lading was not quite the same in form as ours; it purported to be an order by the shipper to the captain to deliver, or a notice to the consignee of the shipment, not a receipt by the company or captain, and the list of the goods was written into it, not contained in a separate invoice. A copy of the bill of lading, it seems, was, where feasible, despatched

by land route to the consignee; but usually the bill was packed in with the goods. It was sometimes made out in blank, or, at least, in the alternative; whether it circulated as representing the goods does not appear. The art of slicing down the vessel's responsibility to the smallest possible contingency was apparently unknown; but it has not taken long for Japanese shipping companies to learn the value of these limiting clauses. The rules of the guild, however, provided for the ordinary contingencies, and questions of average and freight were settled by the guild rules.

Such were the facts of Japanese commerce. It is idle to contend that Japanese mercantile life of the last generation was equal in richness of development, complexity of operation, fertility of resource, or importance of undertakings to the Western mercantile life of to-day, or even of the last generation. But we do not have to go very far back to reach a point where the comparison is not so unequal a one, and what we do find throughout is that Japanese commerce possessed, with scarcely an exception, the fundamental mercantile institutions and expedients with which Western commercial law deals. Europe and America have for nearly two hundred years had advantages which have been denied to Japan; notably they have had the opportunity for a free exchange of the new ideas which each day brings forth, an opportunity through the lack of which Japan has suffered in almost every department of commerce, whatever it may have gained in art. But meanwhile Japan has been in the possession of these fundamental commercial notions, and, like the steward who turned his one talent into five, this country has preserved and developed these ideas to as high a degree as was possible under the circumstances. Greater opportunities for assimilation and enlargement now lie before it; and it is idle to suppose that they will not be amply utilized.

We have devoted some space to elucidating these topics, because we think they illustrate the whole issue of Japan's fitness for the new laws. The question is whether we are pouring new wine into old and worn-out bottles or into bottles reasonably fit to receive it. Are the fundamental legal ideas

of the Japanese people alien or kindred to the continental principles taken as models?

What seems now clear is that our attitude towards Japan is without support, when we assume that the new Code brings in notions and rules novel to the people or opposed to their traditions of commerce. Foreign art (to employ comparison), indeed, has offered to the Japanese new tools, new standards, new canons. Western education is in principle thoroughly different from the received Chinese system. The railway and the steamship were never before known there. In these cases we may assert with truth that the Western importation either is an entire novelty or is radically different from what existed before. But just as Japanese paper is turned out no less skilfully, merely because the processes may now be carried on by steam-power instead of by hand, so we have no cause to anticipate friction from putting into force a modern commercial Code in a nation which has for two centuries possessed nearly every leading institution and expedient therein regulated. It is simply giving to Japan the advantage of the more developed form of these ideas to which the West, by the favor of circumstances, has been enabled to bring them.

IV. The Future of Extra-Territorial Jurisdiction.

An acute observer of French institutions, analyzing the tendency to revolutions which has chacterized that nation, explains it as the consequence of a powerful rationalizing tendency, a capacity for perceiving that which is theoretically right and for trying to make it square with the facts, no matter at what practical cost to the country. This is just the opposite of the Anglo-Saxon idea. For a hundred years England tolerated electoral corruption, until it became unbearable. For nearly a century the United States were satisfied to put aside the problem of slavery, until events forced them to cut the knot with violence. In international affairs the Anglo-Saxon spirit is the guide of nations. A *modus-vivendi*,—this is all that is desired. Theoretical incongruities and possible mischances may be disregarded, if only to-day's life be fairly well regulated. Now, this is the condition of Extra-terri-

toriality as an international institution. It is but a makeshift. It is liable at any moment to fail to run smoothly. It is only now and then that we are stirred up to reflect on the makeshift character of the whole institution and the practical difficulties into which it is liable at any moment to plunge us.

As an instance of the complex and unworkable character of the principle of extra-territoriality, we make take some of the incidents of the latest trial of consequence (except the Ravenna-Chishima Case of 1893) in Yokohama.

Take, first, the holding of a coroner's inquest, by a British coroner over a British subject killed by an American citizen. A coroner, as Blackstone defines him, "is ordained . . . to keep the peace . . . If any be found guilty by his inquest, of murder or other homicide, he is to commit them to prison for farther trial . . . and must certify to the Court of the King's Bench or the next assizes."

Clearly, as Mr. Piggott puts it in his volume on "Extra-territoriality," "the duties of the coroner of inquiring into all cases of sudden death . . . form an integral part of the administration of the criminal law." The inquest in Japan is part, then, of the machinery which serves to discover and punish those over whom the (in this case) British Consular Courts have jurisdiction. But if a British subject is killed by a United States citizen, the British Consular Court has no jurisdiction. How, then, can it be right to set that machinery in motion, since it is clear that in the end it must be to no purpose? Doubtless, it will be said that in the beginning the cause of death is assumed to be unknown, and that proceedings must be begun as of course. Yet this argument, perhaps, requires that when it appears that the cause of death was a person over whom British courts have no control, the proceedings should thereupon be terminated with a verdict to that effect. Mr. Piggott believes that "presumably the inquisition may charge the offence against either a native or a foreigner [of another nation]." But there is another passage in Mr. Piggott's book which seems to contradict this conclusion. "The peculiar nature," he says, at p. 94, "of this jurisdiction [of each treaty power over its own subjects] must

not be lost sight of. In no sense does the foreign sovereign act as a protector of the rights of his subjects, he merely enforces their duties." May it not, then, be argued that the moment a foreign Inquest assumes to declare a verdict of, say, wilful murder against the subject of another foreign Power, the coroner and his men cease to perform the function of enforcing the duties of their nationals, and undertake that of protecting their rights, this latter according to Mr. Piggott, a function which they do not possess? It is not intended to express a final opinion on the subject; but merely to indicate that there is something to be said for both views, and that it is fortunate that the doctrine of extra-territorial jurisdiction has not yet been strained at all its weak points.

Perhaps the weakest feature of it is the obstructions which it places in the way of adequate judicial investigations. In the summoning of witnesses and the extraction of testimony, extra-territoriality leaves justice bound as with ropes and helpless to attain its ends. In cases like the one just stated, the greatest opportunities exist for obstruction and error. It was without the power of the American Consular Court to enforce the attendance of any witnesses not citizens of the United States. It is true that by the Orders in Council, the judge of the British Consular Court is empowered to order the examination of British witnesses on application of a foreign court. But it is obvious that the ordering of such an examination is within the discretion of the British judge, and cannot be compelled by the foreign court. Apart from this act, a foreign court is powerless either to compel the attendance of witnesses who are subjects of other nations or to prevent them from refusing to answer whenever the question is not to their liking. The only method of compulsion in such cases is a commitment for contempt, and this power is given to a foreign court only over its own nationals. In such a case it is quite within the bounds of possibility that the non-compellable witnesses may stand by and see an accused person suffer wrongly or a crime go unproved, if it suits their interests to do so; or they may bargain with the accused's representative and agree to go on the stand on condition of being asked

certain classes of questions only. We do not believe it likely that national prejudice will ever lead to such dire results, but experience teaches that we must be prepared for the unlikely. In the judgment in the Hetherington Case in Yokohama, in 1892, it was suggested that those who suppressed evidence in this way were to be regarded as accessories to crime. But whatever their position might be morally, it is clear that they are legally guilty of no offence, since the law of the trial court extends only to its own nationals, and the refractory absentees are held to no sort of responsibility to that court, if indeed to any.

And if such persons do consent to go upon the stand, what security is there for their testimony? Certainly there is for them no danger of the pains and penalties of perjury. The nimbus of extra-territoriality is ever with them, and their criminal responsibility for false testimony exists only when they are standing in the court of their own nation. It is difficult to see how false testimony given by Japanese or Italian subjects in a United States Consular Court could be the cause of an hour's detention of those witnesses, richly as they might deserve it. This is one of the features of extra-territoriality, that wrong-doing is licensed to flourish unchecked. It is only to be wondered that opportunity does not oftener occur to demonstrate this practically. Analogus to difficulties of this sort is the obstruction to the procurement of material evidence. The card and the pistol, for example, which figured in the Hetherington trial, passed through the hands of at least one set of officials who were not bound to produce them in the Counsular Court when the time came; and if the case had been a little different, the number might have been greater. Where faithful and impartial officers are concerned, no miscarriage can arise. But it is apparent that there would here be ample opportunity for conduct which would seriously obstruct the course of justice. Illustrations have been taken from the Hetherington Case of 1892. But the moral applies to the whole mass of controversies arising in our Treaty Ports. It is a matter which affects all the Treaty Powers alike. Perhaps it adds especial complications to American jurispru-

dence, because it involves questions of constitutional guarantees; but on the whole this is no more serious a tangle than that to which the British Statute-book and British Colonial administration are liable. There can hardly be two opinions as to the makeshift character of the whole institution. We can only hope that it will have passed away from Japan before any event occurs to strain it to the breaking point and involve us in inextricable consequences.

The question naturally arises, Why should we not agree to the abolition of extra-territorial jurisdiction in Japan? What circumstances should restrain us from acceding to the demands for abolition which Japan formally made by its Commissioner, at Berne, in September, 1892, at the Session of the Institute of International Law?

The practical ground for the establishment and maintenance of the system of extra-territorial jurisdiction was concisely expressed by Secretary Fish, in 1871, when he wrote to Minister De Song: "All that has been sought by the Christian Powers is to withdraw their subjects from the operation of such laws as conflict with our ideas of civilization and humanity, and to keep the power of trying and punishing in the hands of their own representatives." This is the whole basis of extra-territorial jurisdiction in Japan. The diplomatic documents of the times, in which the epithets "semi-barbarous," "semi-enlightened," "despotism," and the like, are freely used, indicate clearly the nature of the dominant conception. Epithets such as these never had any foundation in fact. The right of Japanese culture to receive in the fullest degree the title of a civilization is still to a certain class of people an impassable *pons asinorum*, but it is open to a demonstration as easy and as various as is the Pythagorean proposition. All that could serve, forty years ago, as the basis of a claim of extra-territorial jurisdiction, was the undoubted presence of a feudal framework in the government of the country. Even this never seemed a sufficient basis to Townsend Harris, the negotiator of the treaty. He declared that the claim was "against his conscience;" and the then Secretary of State (Marcy) regarded it as an unjust interference with the municipal laws of a country. But this frame-

work of feudalism disappeared many years ago. Japan had long since outgrown it; and it fell away, amid the cannon-smoke of 1868, like a rotten scaffold which has been left about a completed mansion and finally falls at a tremor of the earth. With it disappeared the outward disfiguring incidents of a feudal state of society. It may be safely said that there is little more left of feudalism to-day in Japan than there is in Germany. As for the inner substance—the degree of refinement to which the art of living has been carried, the private and public virtues of the people—it is inexcusably invidious for us to assume to judge them in any other spirit than that in which we would criticise Italy, France, or any other political equal of Europe. Let anyone come to Japan in the spirit of a learner, and he will find that it has lessons of life even for self-contained America.

The exasperating thought to the sensitive Japanese (and that is every Japanese, when the national honor is touched), is that, while the bonds of exterritoriality are fast about his country, other nations whose irregular and irresponsible justice constantly calls for diplomatic intervention, are endowed by an accident of birth (so to speak), with an autonomy which some of these very offenders join in denying to Japan. When the Japanese subject glances over our diplomatic history and reads the incidents of the *Virginius* in Cuba, of Van Bokkelen in Hayti, of Wheelock in Venezuela (to name no others), and realizes that every one of these States is as much beyond his own in international rights as it is behind in much that makes for civilization, it is no wonder that he regards Treaty Revision as first and foremost a question of redeeming the national honor. He need not claim that justice is administered in his country in any manner that could be compared to that of any nation of the earth. Certainly, he could not say that the British or American resident could find everything here that he would meet in his own courts. There are certain features of his justice which an Anglo-Saxon cannot expect to find anywhere duplicated. *Quot honimes, tot sententiæ*, and the rule applies to nations also. But the writer is free to say (knowing something of Japanese courts and not very much of European) that

he would as willingly be tried in a Japanese court as in that of any Continental nation—and more willingly in some respects.

To give an instance, the penalties (especially the fines) of the Japanese Criminal Code are considerably lighter, strange as it may seem to some, than in our own country. This was recently well illustrated by the action of the British representative in Japan, when he gave assent to the new Game Regulations and promulgated a British draft; for the penalties of the Japanese ordinance reached a maximum of from twenty to fifty dollars (Mexican), while those of the British Order reached from fifty to one hundred, with the added alternative of a term of imprisonment. In general practice, too, the Japanese courts seem to run to much lighter terms of imprisonment. Again, the foreigner is everywhere here treated with much more consideration than in continental Europe—for reasons which cannot here be explained; and a foreigner may count on more courtesy in a Japanese tribunal than the average commoner could look for on the Continent.

After all, what is it that goes to make a proper administration of justice? Is it good laws? Then most emphatically there is justice here; for Japan has laws equal to the best in Europe. They are the product of a concert between the best foreign and native experts, and have been two decades in preparing. Is it competent judicial officials? There are now some 1250 in all, nearly half of them trained in Western law; organized into courts on a most approved plan; stationed in every province and county of the Empire; and comparing more than favorably with English and French courts in the despatch of business. Many of them lack experience, but that is a defect which time is every day curing, and is certainly not to be emphasized. Is it that the nation must have certain fundamental notions of law and justice? Then it can be demonstrated that Japan is one of the most law-abiding nations in the world; that it possesses a legal and judicial history dating back, at least, to the days of Charlemagne; that such institutions as banks and exchanges, with their accompaniments of cheques, bank-notes, bills of exchange, and "futures," have been familiar for two hundred years in Japan;

that the judiciary of the last two centuries developed their precedents in a manner differing little in spirit from that of the judges of England; and that a system of procedure and of substantive rights was then worked out, containing in essence all the titles of European law, and corresponding in general trend to Continental rules. Mr. Blaine, in 1881, in language which there could have been no evidence to justify, predicated of this people "an utter incompatibility of habits of thought on all legal and moral questions," which, with other things, "made it impossible to trust the persons, the property, and the lives of our own people to such a jurisdiction." Of this it can only be said that a more cruel libel was never penned in our diplomatic history. So gross a misconception can be compared only to some of the ignorant notions of the United States that lodged in many British heads for decades after the Revolution. But time has brought its revenges. "All that has been sought," said Mr. Fish, in the passage above quoted, "is to withdraw their subjects from the operation of such laws as conflict with our ideas of justice and humanity." Yet one year ago, twenty-one years after this sentence was penned, an accused murderer, Carstens, arraigned in a Yokohama tribunal, demanded that he should be tried in a Japanese court, not in the German Consular Court, disclaiming his German nationality for the specific reason that he could hope under the Japanese Code, but not under the German, for a certain diminution of penalty on the ground of extenuating circumstances. Thus, in 1892, we are presented with the spectacle of a subject of a leading Western Power "seeking to withdraw" himself "from the operation of a law" of his own State because the corresponding law of Japan is less "in conflict with his ideas of justice and humanity."

It is time that we recognized for Japan the validity of the honorable principle enunciated by Secretary Marcy nearly forty years ago, during a diplomatic incident with Austria: "The system of proceedings in criminal cases in the Austrian Government has undoubtedly, as is the case in most other absolute countries, many harsh features, and is deficient in many safeguards which our laws provide for the security of

the accused. But it is not within the competence of one independent Power to reform the jurisprudence of others, nor has it the right to regard as an injury the application of the judicial system and established modes of proceeding in foreign countries to its citizens when fairly brought under their operation. All we can ask of Austria . . . is that she should give American citizens the full and fair benefit of her system, such as it is. . . . She cannot be asked to modify her mode of proceedings to suit our views, or to extend to our citizens all the advantages which her subjects would have under our better and more humane system of criminal jurisprudence."

If this is good law for Austria, it is even better law for Japan; for the legal system of Japan to-day is probably much better than was that of Austria forty years ago. On the principle here set forth, Japan can surely claim that the long-standing indictment against her be quashed without delay, and that her judicial autonomy be once more restored as nothing less than justice.

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